Supreme Court, U.S.
FILED

01 544 SEP 26 2001

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

HARRIS COUNTY, TEXAS,

Petitioner,

v.

SIMI INVESTMENT COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL A. STAFFORD
County Attorney
Harris County, Texas

BRUCE S. POWERS*
Assistant County Attorney

1019 Congress, 15th Floor
Houston, Texas 77002
Telephone: (713) 755-5101
Facsimile: (713) 755-8924

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

89 pp

QUESTIONS PRESENTED

1. Whether substantive due process claims alleging deprivations of property are subsumed under the Takings Clause.

2. Whether Harris County's assertion of a claim of ownership of real property was so arbitrary or irrational as to rise to the level of a violation of substantive due process.

3. Whether a federal court may award expert witness fees in excess of the amount permitted by 28 U.S.C. § 1821 if the court makes a finding that the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF APPENDICES iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH HOLDINGS OF THIS COURT AND IS IN DIRECT CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT 7

II. THE DECISION BELOW IS ERRONEOUS 14

III. THE QUESTIONS PRESENTED ARE OF NATIONAL IMPORTANCE 15

CONCLUSION 16

TABLE OF APPENDICES

APPENDIX 1 – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED DECEMBER 21, 2000 ..App. 1

APPENDIX 2 – OPINION ON JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ENTERED AUGUST 26, 1998.....App. 34

APPENDIX 3 – FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ENTERED APRIL 21, 1999...App. 58

APPENDIX 4 – SUPPLEMENTAL FINDINGS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ENTERED MAY 13, 1999.....App. 60

APPENDIX 5 – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON PETITION FOR REHEARING EN BANC FILED JUNE 28, 2001.....App. 62

APPENDIX 6 – CONSTITUTIONAL AND STATUTORY PROVISIONS...App. 65

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver, 510 U.S. 266 (1994) 5, 6, 7, 8, 10

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 13

Armendariz v. Penman, 75 F.3d 1311 (9th Cir.) (en banc) 5, 6, 8, 9, 10

Bateman v. City of West Bountiful, 89 F.3d 704 (10th Cir. 1996) 10, 11

Collins v. City of Harker Heights, Texas, 503 U.S. 115 (1992) 12

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 12

Crawford Fitting Co v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) 7, 13

Graham v. Connor, 490 U.S. 386 (1989) ..... *passim*

Lovett v. County of Harris, 462 S.W.2d 405 (Tex.Civ.App. – Houston [1st Dist.] 1970, writ ref'd n.r.e.) 3, 14, 15

Macri v. King County, 126 F.3d 1125 (9th Cir. 1997) 10

Soldal v. Cook County, Ill., 506 U.S. 56 (1992) 8

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 8

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) ... 6, 10, 11, 12, 16

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1343 4

28 U.S.C. § 1821 ..... 1, 7, 13

28 U.S.C. § 1920 ..... 1, 7, 13

UNITED STATES CONSTITUTION

Fifth Amendment 1, 4, 11

Fourteenth Amendment 1, 4

TEXAS CONSTITUTION

Article 1, § 17 ..... 4, 15

PETITION FOR A WRIT OF CERTIORARI

Harris County, Texas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 236 F.3d 240 and is reproduced as Appendix 1 to this petition. The Court's opinion on Petition for Rehearing En Banc is reported at 256 F.3d 323 and is reproduced as Appendix 5. The opinion of the district court is reported at 13 F.Supp.2d 603 and is reproduced as Appendix 2.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and judgment on December 21, 2000, and denied rehearing and rehearing en banc on June 28, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Fifth and Fourteenth Amendments and 28 U.S.C. §§ 1821 and 1920 are reproduced in Appendix 6.

STATEMENT OF THE CASE

This case involves an alleged violation of substantive due process resulting from "interference" with a property owner's right of access to a public street. In 1961 the Commissioners Court of Harris County requested the consent of the City of Houston to the County's acquisition of right-of-way for streets leading to the site of the Houston Astrodome, including an extension of Fannin Street. The City Council approved the location and alignment of the proposed streets and consented to and authorized the acquisition of the property by the County. On December 5, 1961, Harris County acquired a 20.67520 acre tract of land from the Trustees of the Hermann Hospital Estate. The deed provided that an extension of Fannin Street was "to run in a North-South direction along the Eastern side of the Property described above, with the remaining Western portion of said Property to be used for street purposes or included in a park and stadium site lying along the West side of said Property." The original maps reflecting the approved location and alignment of the Fannin Street right-of-way could not be found and are not part of the record. The Hermann property adjoins land now owned by Respondent Simi Investment Company, Inc. Over the years Harris County has claimed that a strip of park land separates this adjoining property from the Fannin Street right-of-way.

In 1964 Texaco, Inc. sought permission from Harris County to construct an approach into Fannin Street from one of the lots now owned by Simi Investment. The County's lessee, the Houston Sports Association, Inc., objected and permission was denied. Roy Hofheinz, the president of the Sports Association, owned land located

north of the property now owned by Simi Investment. The Hofheinz property had access to Fannin Street.

In 1969 John W. Lovett and other adjoining property owners filed suit against Harris County seeking a mandatory injunction requiring the County to remove an existing fence preventing access from their property into Fannin Street. A take nothing judgment rendered against the plaintiffs in that case was affirmed on December 31, 1970. *Lovett v. County of Harris*, 462 S.W.2d 405 (Tex.Civ.App. – Houston [1st Dist.] 1970, writ ref'd n.r.e.).

In 1984 Sterling B. McCall, Jr., the Lessee of the property located at the corner of South Loop West and Fannin, requested that he be permitted to keep a driveway into Fannin Street which had been constructed on such property. Commissioners Court ordered that the County Attorney's Office be requested to take necessary steps to have Sterling McCall Toyota remove the driveway on Fannin Street and replace the County's fence.

In March 1974, Fannin Street was deleted from the County's road log. Simi Investment began acquiring the first parcels of its property in 1981. On December 26, 1984, Simi acquired the lots owned by John W. Lovett. Additional lots were acquired in 1990 and 1995. In 1996 Simi sought access to Fannin Street from the City of Houston. The City withheld its approval, because such access involved "a strip of land that Harris County has consistently claimed an interest in since 1961".

Respondent Simi Investment Company, Inc. originally filed this suit in state court. Simi alleged that it had a right of access to Fannin Street in Houston, Texas and the County had interfered with such access. Simi sought

damages pursuant to Article 1, § 17 of the Texas Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution. Petitioner Harris County, Texas removed the suit to federal court. Thereafter, Simi filed a motion to remand stating that its federal takings claim was not ripe and "there is no ripe federal question for adjudication by the Court". Based on this admission, Harris County informed the district court that it would not oppose remand. Nevertheless, the district court did not rule on the Motion to Remand at that time and instructed the parties to move for summary judgment. After the motions were filed, Simi Investment filed an Amended Motion for Partial Summary Judgment and sought leave of court to amend its complaint. The proposed amended complaint contained a § 1983 claim. Simi alleged that jurisdiction was proper pursuant to 28 U.S.C. §§ 1331 and 1343.

The district court granted leave to file Simi's amended complaint and denied the requested remand. At the same time the district court signed an Interlocutory Judgment and an Opinion on Judgment granting declaratory relief in favor of Simi Investment. Based upon various surveys in evidence and the language of the Hermann deed, the district court concluded that there was no county owned strip of land separating the Simi property from the Fannin Street right-of-way and, therefore, Simi was entitled to access. Thereafter, the district court conducted two evidentiary hearings, one on the issue of damages and one on the issue of attorney's fees.

The district court signed a final judgment in favor of Simi Investment declaring that Simi may have direct access to the Fannin Street right-of-way from its property

and awarding damages against Harris County in the amount of $823,540.00, attorney's fees in the amount of $367,000.00 and expenses in the amount of $116,994.32. On appeal the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court in all respects, except for the award of attorney's fees, which the court vacated and remanded for further consideration consistent with its opinion. The court found that a takings analysis did not exhaust Simi's constitutional claims. The court stated that when a state interferes with property interests, a substantive due process claim *may* survive a takings analysis and, therefore, provide jurisdiction for a federal court. The court held that the County's interference with Simi's access to Fannin Street was an abuse of governmental power which rose to the level of a substantive due process violation. Further, the court affirmed the district court's award of expert witness fees against the County on the ground that the County had acted vexatiously and oppressively in the litigation. The County's Petition for Rehearing En Banc was denied.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this case for three reasons. First, the Fifth Circuit's decision conflicts in principle with the holdings of this Court in *Graham v. Connor*[1] and *Albright v. Oliver*[2] and conflicts directly with the decision of the Ninth Circuit in *Armendariz v. Penman*,

[1] 490 U.S. 386 (1989).

[2] 510 U.S. 266 (1994).

75 F.3d 1311 (9th Cir.) (en banc). In *Graham* and *Albright* this Court said that where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing the claim. Although the court below did not take issue with this principle, it nevertheless concluded that a substantive due process claim can survive a related takings argument. This decision clearly conflicts with the Ninth Circuit's decision in *Armendariz* that a substantive due process claim failed because it was preempted by other constitutional claims under the rule of *Graham v. Connor*. Second, the writ should be granted because the decision below is erroneous. Simi's claim should have been treated as an unripe takings claim rather than a substantive due process claim. Moreover, the governmental action in this case did not constitute a violation of substantive due process. Third, the questions presented in this case are of national importance. The Fifth Circuit's holdings in the instant case will certainly encourage litigants to assert substantive due process claims as a method of avoiding the ripeness requirements of *Williamson County*.[3] Moreover, expansion of the substantive due process concept into areas which have traditionally been covered by takings analysis permits litigants to avoid the wisely crafted restrictions on takings claims simply by arguing that the government's actions are arbitrary. Further, this Court has rejected claims that the due process clause should be

---

[3] *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law. Nevertheless, the opinion below effectively imposes just such a duty. ("We agree with the district court that Simi has alleged a continuing nuisance . . . ") Pet. App. 19. Such an expansion of substantive due process analysis has the potential to significantly impact local governments all across the United States.

In addition to the foregoing, this case presents a second aspect in which the decision below conflicts with a holding of this Court concerning the taxing of expert witness fees as costs. In that regard the Fifth Circuit held that courts may award expert witness fees in excess of the statutory limitations "when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons". The court's ruling conflicts with this Court's holding in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*[4] that "absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920".

I. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH HOLDINGS OF THIS COURT AND IS IN DIRECT CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT.

In *Albright v. Oliver*, 510 U.S. 266 (1994), this Court said that "where a particular Amendment 'provides an explicit textual source of constitutional protection'

---

[4] 482 U.S. 437 (1987).

against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process", must be the guide for analyzing these claims' " (quoting *Graham v. Connor*, 490 U.S. 386 (1989)). Although the Fifth Circuit expressly recognized this principle, the court found that a takings analysis "does not exhaust Simi's constitutional claims". Pet. App. 15. In reaching this conclusion the court relied upon this Court's statements in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) ("We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another.") and *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn."). However, neither of those opinions dealt with *substantive* due process. Therefore, the quoted statements do not justify a resort to the "generalized notion" of substantive due process in a takings case when the claim is covered by the more explicit textual source of constitutional protection, i.e., the Takings Clause.

The Fifth Circuit's conclusion that Simi's substantive due process claim is not subsumed under the Takings Clause conflicts with the decision of the Ninth Circuit in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc). In *Armendariz*, the Ninth Circuit applied this Court's *Albright/Graham* analysis in a case involving housing code enforcement sweeps. The plaintiffs alleged

that city officials conducted the sweeps for improper purposes. The court said that the plaintiffs alleged "a scheme by defendants to evict tenants, deprive the plaintiffs of rental income that could have been used to bring the buildings into compliance, prevent owners from learning what repairs were necessary to come into compliance, and invent new violations after plaintiffs had conducted repairs that would bring their properties into compliance. The alleged purpose of this scheme was to deprive the plaintiffs of their property, either by forced sale, driving down the market value of the properties so a shopping center developer could buy them at a lower price, or by causing the plaintiffs to lose their properties by foreclosure". *Id.* at 1321. The Ninth Circuit concluded that the defendants' actions if proven would constitute a taking of the property. The court said that even if the city's alleged conduct was clearly arbitrary and unreasonable, having no relation to the public health, safety, morals, or general welfare, the plaintiffs' substantive due process claim failed because it was pre-empted by other constitutional claims under the rule of *Graham v. Connor*. *Id.* at 1318.

In the instant case the Fifth Circuit viewed Simi's claim as solely a substantive due process claim, not a takings claim. The court based its analysis of the claim on the ground that "there exists illegitimate governmental conduct that has deprived Simi of its property rights for the benefit of private interests". Pet. App. 16. In that regard the court said that "the only basis in the record to explain the County's interference with access appears to be that – as the district court recognized – this impediment would benefit the privately held Hofheinz-Smith

properties and the HSA". Pet. App. 27. Unlike the Ninth Circuit in *Armendariz*, the Fifth Circuit did not view the County's alleged action as a "taking" of Simi's property. In that regard the court said, " Simi's precise claim is that the County arbitrarily interfered with its property rights, not that the County sought to acquire or regulate the use of the property". Pet. App. 14. However, for purposes of *Graham* analysis, the issue is not whether a plaintiff has characterized his claim as a substantive due process claim, but whether the claim *can* properly be viewed as a takings claim.

If the claim can be asserted under the Takings Clause, then it must be treated as such in accordance with *Graham* and *Albright*. To hold otherwise would give rise to the problem the Ninth Circuit addressed in *Macri v. King County*, 126 F.3d 1125 (9th Cir. 1997). In *Macri* the court said that claimants "cannot sidestep *Armendariz* by re-characterizing their claim as lying solely in substantive due process". The court noted that a concern addressed in *Armendariz* was a loophole in takings law regarding the ripeness doctrine, i.e., plaintiffs presenting what is essentially a takings claim under the claim of substantive due process to avoid the ripeness requirements of *Williamson County*. The court held that since the Takings Clause provides an explicit source of constitutional protection against the challenged governmental conduct (denial of property owner's plat application to subdivide property), "substantive due process has no place in this context".

Similarly, in *Bateman v. City of West Bountiful*, 89 F.3d 704 (10th Cir. 1996), the Tenth Circuit concluded that a substantive due process claim was subsumed within the more particularized protections of the Takings Clause.

Bateman's property was subject to a conditional use zoning scheme. Bateman erected buildings on the property over a period of years. The City was aware of the construction and periodically sent building inspectors to Bateman's lot. After the buildings were completed, a Certificate of Noncompliance with setback and side yard requirements was recorded against the property. This effectively prevented Bateman from selling or refinancing the property. Bateman alleged that the City's setback and side yard requirements as applied to his lot did not substantially advance a legitimate state interest or promote health, safety, or the public welfare. In addition to a takings claim, Bateman asserted a substantive due process claim. Finding that the claim was unripe, the court said that a contrary holding "would render the Supreme Court's decision in *Williamson* nugatory, as it would enable a resourceful litigant to circumvent the ripeness requirements simply by alleging a more generalized due process or equal protection violation". *Bateman*, 89 F.3d at 709.

In the instant case, correct identification of the textual source of constitutional protection goes directly to the issue of subject matter jurisdiction. If Simi's claim is properly characterized as a takings claim, the claim is unripe. As this Court said in *Williamson County*, "the Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. . . . If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking". The court

concluded that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation". *Williamson County*, 473 U.S. at 194-195. The Fifth Circuit agreed that Simi's takings claim was not ripe for review, but held that the County's jurisdictional argument "does not dispose of Simi's suit because the § 1983 substantive due process claim was properly before the district court". Pet. App. 13. However, if substantive due process claims alleging deprivations of property are subsumed under the Takings Clause, Simi's substantive due process claim cannot be the basis of jurisdiction.

Harris County submits that the conflict between the decisions of the Fifth and Ninth Circuits demonstrates the need for further elucidation of the *Graham* rule in the context of claims alleging deprivations of property. As the Court said in *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992), "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended". The *Graham* rule has the salutary effect of limiting the occasions in which resort to substantive due process analysis can be had. If a claim is "covered by" a more specific constitutional provision, substantive due process analysis is not appropriate. *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). That a claim may be unripe does not mean that it is not covered by the more explicit textual source of constitutional protection.

With respect to the third question presented concerning expert witness fees, the Fifth Circuit's conclusion that

courts may award expert fees in excess of the statutory limitation when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons conflicts with this Court's holding in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). In *Crawford Fitting*, the Court held that "absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920". Section 1821 permits a fee of $40.00 per day for each day's attendance plus specified expenses. It does not permit the taxation of the cost of professional services. In the instant case, the district court awarded Simi expenses in the amount of $116,994.32. Included in this amount were the amounts charged by Simi's expert witnesses ($75,703.00; $30,059.00). R-Vol. 5, pp. 30-31.

In support of its ruling, the Fifth Circuit relied upon this Court's opinion in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which addressed the question of whether federal courts could award attorney's fees as costs. Strangely, the court did not even cite *Crawford Fitting* (which dealt specifically with expert witness fees). In *Crawford Fitting*, this Court stated that "Congress has made its intent plain in its detailed treatment of witness fees". 421 U.S. at 444-445. Although the Court did make reference in *Alyeska* to the inherent power of the courts to allow attorney's fees in particular situations, there is nothing in the Court's opinion in *Crawford Fitting* which suggests that expert witness fees in excess of the statutory limits may be taxed as costs against the losing party under any circumstances.

II. THE DECISION BELOW IS ERRONEOUS.

The Court below erred in concluding that a takings analysis did not exhaust Simi's constitutional claims. Since the claim could be brought as a takings claim, the *Graham* rule precluded the assertion of a substantive due process claim. However, even if the substantive due process claim were not subsumed under the Takings Clause, the decision below would still be erroneous. Harris County's assertion of ownership of a strip of land between Fannin Street and Simi Investment's property was not arbitrary or irrational. By the time Simi Investment acquired its property and sought access to Fannin Street from the City of Houston, the case of *Lovett v. County of Harris*, 462 S.W.2d 405 (Tex.Civ.App. – Houston [1st Dist.] 1970, writ ref'd n.r.e.) had been decided. The state court of appeals opinion in *Lovett* reflects that in 1963 Harris County erected a chain link fence running in a northerly and southerly direction .95 inches west of the west boundary line of the Knight's Main Street Addition (the addition in which Simi's lots are located) and 15.65 feet east of the eastern most part of the curb on the east side of Fannin Street. The *Lovett* plaintiffs sought a mandatory injunction requiring the County to remove the fence. The court said it was undisputed that Fannin Street as extended by Harris County across the property acquired from the Hermann Hospital Estate is located 16.6 feet west of the west line of the Knight's Main Street Addition and does not abut on the Addition at any point. The court stated that the plaintiffs had to show that the intervening strip of land between Fannin Street and their property was dedicated for street purposes. The plaintiffs failed to do so. The court held that the erection of the

fence did not constitute a taking of the plaintiffs' property within the meaning of Article 1, § 17 of the Texas Constitution. The outcome of the *Lovett* litigation fully justified a good faith belief by county officials that Harris County owns a strip of land between the Fannin Street right-of-way and Simi Investment's property line. Thus, there was a rational basis for Harris County's assertion of a claim of ownership of the subject strip of land.[5]

III. THE QUESTIONS PRESENTED ARE OF NATIONAL IMPORTANCE.

The questions presented in this case are important because they raise issues which can have a significant impact upon local governments throughout the country. What is or is not arbitrary or irrational behavior on the part of the government is often in the eye of the beholder. Consequently, opinions which encourage the expansion of substantive due process analysis and the applicability of such analysis bear close scrutiny. Departure from the

---

[5] The Fifth Circuit discounted the importance of the *Lovett* opinion because it makes reference to a strip of land 16.6 feet in width rather than 5 feet. The court said that it was hard pressed to find a reason for the County's retention of five feet out of the original 16.6 feet of land once the County yielded jurisdiction over Fannin Street to the City of Houston in 1974. However, the answer can be found in one of the Plaintiff's exhibits. Normally the curb line of a street is placed ten feet from the right-of-way line. "In the case of Fannin Street, the paving was placed 15 feet from the property line in order to leave a 5 foot strip of 'Park Land' outside of the proposed Fannin Street right-of-way so that Harris County could forever control access to Fannin". Plaintiff's Exhibit 19. Thus, the County retained the 5 foot strip because it did not consider it part of the right-of-way.

Graham rule in the context of takings claims promotes evasion of the ripeness requirements of *Williamson County*. The split between the circuits concerning the application of *Graham* in such cases shows that guidance from this Court is needed.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL A. STAFFORD
County Attorney
Harris County, Texas

BRUCE S. POWERS*
Assistant County Attorney

1019 Congress, 15th Floor
Houston, Texas 77002
Telephone: (713) 755-5101
Facsimile: (713) 755-8924

Counsel For Petitioner

**Counsel of Record*

APPENDIX 1

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED DECEMBER 21, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20686

SIMI INVESTMENT COMPANY INC

Plaintiff - Appellee

v.

HARRIS COUNTY TEXAS

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas.

(Filed Dec. 21, 2000)

Before KING, Chief Judge, and REYNALDO G. GARZA and PARKER, Circuit Judges.

KING, Chief Judge:

Defendant-Appellant Harris County, Texas appeals the district court's judgment against the County, arguing that the district court erred in holding that the County had unconstitutionally interfered with the property rights of Plaintiff-Appellee Simi Investment Company, Inc. The district court found that the County had unlawfully prevented Simi from gaining access to the city street adjacent to its property in contravention of Texas law. Specifically, the district court held that the County had abused its governmental power and violated Simi's substantive due

process rights by inventing and claiming ownership of a nonexistent five-foot by 3000-foot county park, which blocked Simi's lawful access to the street. For the following reasons, we AFFIRM the judgment of the district court, including the grant of attorneys' fees; however, we VACATE and REMAND to determine the amount of those attorneys' fees in a manner consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

This dispute centers around the real property (the "Simi Property") owned by Simi Investment Company, Inc. ("Simi") which is located in downtown Houston in close proximity to the Houston Astrodome stadium.[1] More specifically, the Simi Property is situated adjacent to Fannin Street at the intersection of Interstate Loop 610 ("Loop 610") and Fannin Street. Simi sought from the City of Houston ("City") access to Fannin Street from the

---

[1] We are guided through the curious history and development of this particular strip of land by the stipulated record of exhibits which was submitted by the parties and was adopted by the district court as the entire record. On August 12, 1996, the district court entered a Conference Memorandum which stated that the case would be resolved by analyzing the documentary evidence submitted. On September 23, 1996, the district court entered a second Conference Memorandum recording that the parties had stipulated to exhibits 1 through 25 and that the exhibits and other documents submitted would constitute the whole record. On August 26, 1998, the district court allowed Simi to supplement the record with documents not previously turned over by the County. In addition, we rely on the "Chronology" included as an addendum to the district court opinion. *See Simi Investment Co. Inc. v. Harris County, Tex.*, 13 F.Supp.2d 603, 609-13 (S.D.Tex.1998) (addendum to opinion).

Simi Property, but was denied access by the City because Harris County (the "County") claimed an interest in an intervening five-foot sliver of land that runs alongside this property, separating it from Fannin Street.

This land dispute finds its origin in the early 1960s when the construction of the Astrodome led to increased development in the area surrounding what is now the Simi Property. Two of the major investors in the area were Roy Hofheinz and R.E. Smith. Hofheinz was a former Harris County judge and had been the chair of the County's governing board, the County Commissioners Court. Hofheinz was also President of the Houston Sports Association (the "HSA"), which leased the Astrodome from the County. Hofheinz-Smith owned property north of the Simi Property site, which was also located along the eastern side of Fannin Street. As a result, Hofheinz-Smith and the HSA had control of much of the property surrounding the Astrodome.

In conjunction with building the Astrodome, the County acquired rights-of-way for streets leading to the stadium. In 1961, the County Commissioners Court requested the consent of the City of Houston (the "City") to acquire one of those rights-of-way by extending the length of Fannin Street to Loop 610. The City Council approved the location and alignment of the proposed street, and the land was purchased from the Trustees of the Hermann Hospital Estate and conveyed to the County for this purpose. The Hermann Hospital Estate right-of-way consisted of a 20.67 acre tract of land that was approximately 220 feet wide and 4100 feet in length, running north-south alongside the Astrodome site. This north-south right-of-way was bounded on the west by the

Astrodome and surrounding grounds, and on the east by several privately owned properties (including the Hofheinz-Smith property and what is now the Simi Property).

The deed granting the land to the County provided that the property was being purchased with the intention of extending Fannin Street "with such extension to run in a North-South direction along the Eastern side of the Property described above, with the remaining Western portion of said Property to be used for street purposes or included in a park and stadium site lying along the West side of said Property." Pursuant to this deed, the County Commissioners Court issued an order on December 11, 1961, stating that "Harris County is to move back the existing fences to the new right of way line."[2] Subsequently, Fannin Street was constructed as described in the deed on the eastern side of the conveyed property, and fences were erected directly abutting the Simi Property.

The original maps accompanying the County's acquisition of the right-of-way and describing the location and alignment of Fannin Street could not be found, and, thus are not a part of the record. The first site-specific document in the record is dated October 16, 1961, and was created when engineers for the County prepared a plat of

---

[2] The district court found that "[a]fter exhaustive search by the County and Simi, no later order of the Commissioners Court was found that modified in any way the alignment of the Fannin Street right of way described in the Hermann deed and the commissioners order of December 11, 1961." Presumably, the original location of the fence denotes the proper right-of-way line.

the area depicting the land to be conveyed to the County for the right-of-way. The plat showed the granted land directly abutting the Simi property line. This plat, however, was not a survey and did not include the exact location of Fannin Street within the right-of-way.

At some time after 1961, this plat was altered to include the placement of Fannin Street and also, most relevant for this case, a strip of land set off from the eastern side of Fannin Street lying in between the street and the adjoining private properties. This five-foot by 3000-foot strip of land[3] is the county "park" now at issue.

As drawn in the revised plat, the Fannin Street right-of-way runs north-south, directly abutting the Hofheinz-Smith property. However, once past the southern boundary of the Hofheinz-Smith property line, the right-of-way is shown to make a ninety-degree turn west for five feet, and then it continues south to the 610 Loop. The result is the creation of a five-foot strip of land that separates all of the property south of the Hofheinz-Smith property from Fannin Street, but leaves the Hofheinz-Smith property directly abutting the Fannin Street right-of-way. No description or reason is apparent for this offset, nor why the offset begins just south of the Hofheinz-Smith property.[4] This plat also includes the words "location questionable" drawn to indicate the uncertain location of

---

[3] From our review of the record, the 3000-foot measure is an apparent approximation that was adopted by the district court and has been accepted by both parties.

[4] The result of the offset is that the Hofheinz-Smith properties are granted full access to Fannin Street, but all properties south of the Hofheinz-Smith land are denied access.

Fannin Street. There is no revised date on the altered plat. The County contends that this plat depicts the correct location of all relevant boundaries, with Fannin Street running north-south within the original right-of-way and a thin county park on the east side also running parallel to Fannin Street.

From this uncertain beginning, the County's "park" has withstood several legal and administrative challenges to its existence and control. First, in 1964, Texaco, Inc. requested access to Fannin Street from property it owned on the corner of Fannin and the 610 Loop. This request was submitted to the County Commissioner and was then forwarded to the County Engineer. For an unknown reason, the County Engineer sought approval from Hofheinz, as President of the HSA. Hofheinz stated that the HSA was unalterably opposed to the access because the strip of land east of Fannin was included in the original HSA lease of land for the Astrodome site and, therefore, was under HSA's control. This assertion was factually erroneous because HSA was never granted control of the land. However, Hofheinz's objection led the County to deny Texaco access to Fannin Street.

Similarly, in 1969, property owners sought a mandatory injunction against the County, requesting that the fence abutting their properties be removed to grant access to Fannin Street. A take-nothing judgment was affirmed by a Texas court of appeals, which denied the property owners access across the County's land. *See Lovett v. County of Harris*, 462 S.W.2d 405, 408 (Tex. Civ. App. – Houston [1st Dist.] 1970, writ ref'd n.r.e). The court found that the erection of the fence was not an unconstitutional taking under Texas law because the

intervening strip of land separating the property owners from Fannin Street had not been dedicated for street purposes. *See id.*[5]

Most recently, in 1984, Sterling B. McCall, Jr., the owner of McCall Toyota, requested that he be allowed to keep a driveway that had been built on his property which provided the property with ingress and egress onto Fannin Street. This request was denied by the County Commissioners Court, and McCall was required to fence in the driveway to block access to Fannin Street.

The area designated as a park has also been subject to encumbrances that over its history have helped define its status and ownership. In 1974, Entex, a gas company, constructed a gas line running north-south along the east side of Fannin Street. This gas line was buried inside the land now claimed as a park. The district court found that "[n]o Commissioner's Court Order or other document can be found to show the County authorized an easement in the 'park' to Entex." In 1978, the City of Houston approved a plan and constructed an eight-inch water line that crossed the park. Again, the district court found no Commissioners Court order authorizing the easement across the park for the water line. Finally, in 1993, the Metropolitan Transit Authority of Harris County ("METRO") approved construction of a sidewalk on the park property, running alongside the Simi Property. No approval was sought from the County for an easement.

---

[5] The reasoning of the *Lovett* decision will be discussed in detail *infra*.

Control of Fannin Street, itself, was ceded from the County to the City of Houston in 1974. In that year, the County removed Fannin Street from its road logs.

From 1981 to 1984, Simi began acquiring property along Fannin Street.[6] In 1994, Simi submitted to the City a request for driveway access from its property to Fannin Street. Richard Scott, the Technical Director/City Engineer of the Department of Public Works and Engineering for the City, responded that the City "would be in a position to process [the] application, and likely approve it," but for the fact that the County has claimed an interest in the strip of land. Simi then applied to the County for access. This request was denied based on the assertion that the County owned parkland located between Fannin Street and the Simi Property.

Simi sued the County in state court. Simi sought damages and injunctive relief pursuant to Article 1, Section 17 of the Texas Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. In addition, Simi sought a declaration that its land directly abutted the right-of-way of Fannin Street. The County removed the suit to federal court. Simi filed a motion to remand, stating that its federal takings claim was not ripe. The district court did not rule on this motion for remand. In federal court, Simi added a 42 U.S.C. § 1983[7]

---

[6] Simi owns Lots 1, 2, 3, and 4 in Block 68; Lots 1, 2, 3, 4, 5, and 6 in Block 69; Lots 1, 5, and 6 in Block 70 in Knight's Main Street Addition.

[7] 42 U.S.C. § 1983 reads in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

substantive due process claim, alleging that the County's denial of access to an adjoining right-of-way arbitrarily and capriciously denied Simi a property interest established under Texas law.

The district court held two conferences during which the parties were required to submit all relevant documents and exhibits and to stipulate to the agreed facts. Both parties then moved for partial summary judgment based on this established record.[8]

On August 26, 1998, the district court issued an Interlocutory Judgment and an Opinion on Judgment solely on the issue of the existence of the park. The district court reserved deciding the issue of damages or attorneys' fees.

> or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (1994).

[8] The County raises a preliminary challenge to the entry of summary judgment based on this stipulated record. We find no merit in this challenge as it is well established that a district court may enter summary judgment after providing notice and instructing the parties to submit all relevant evidence. *See Celotex v. Catrett*, 477 U.S. 317, 326 (1986) ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence."). In conference, the district court asked the parties to submit all relevant documents and exhibits. It was from this evidentiary basis that the district court decided to grant the request for partial summary judgment. We find no error in these actions.

The court found in its Interlocutory Judgment that: (1) "Harris County had never established a park"; (2) "Harris County had no interest in an intervening 5-foot by 3,000-foot strip east of Fannin Street and west of [the Simi Property] making illegal its interference with the owners' relation to the City of Houston and Fannin Street"; (3) "Harris County had ceded to the [C]ity of Houston all of its right, title, and interest in the eastern-most 100 feet of land conveyed to it by the Hermann Estate"; and (4) "[t]he City of Houston's Fannin Street right of way abuts directly and fully the west boundary of [the Simi Property]."

After the Interlocutory Judgment, two hearings were held on damages and attorneys' fees. In addition, Simi introduced supplemental evidence into the record involving the County's reasons for denying property owners access to Fannin Street. The district court issued a Final Judgment on April 21, 1999, incorporating the Interlocutory Judgment and adding that the County was liable for $823,540 in damages, $367,000 in attorneys' fees, and $116,994.32 in expenses. On May 13, 1999, the district court issued Supplemental Findings that: (1) the County arbitrarily interfered with Simi's property rights; (2) the interference had no relation to a legitimate governmental interest; (3) the interference was an abuse of governmental power; (4) the County persisted in defending its claim to the park in bad faith and used the litigation to vex and oppress Simi; and (5) the County deliberately violated Simi's rights under the United States Constitution.[9]

---

[9] The County challenges these Supplemental Findings as not supported by the evidence. We disagree. From the extensive

The County timely appeals.

II. STANDARD OF REVIEW

We review a grant of summary judgment[10] de novo, applying the same criteria used by the district court in the first instance. *See Norman v. Apache Corp.*, 19 F.3d 1017, 1021 (5th Cir. 1994); *Conkling v. Turner*, 18 F.3d 1285, 1295 (5th Cir. 1994). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

---

exhibits and documentary evidence submitted by both parties, the district court could well establish a basis for liability. In short, without proof that a county park ever existed, the County's justification for interfering with Simi's access to Fannin Street fails, and becomes an arbitrary and capricious act. We, therefore, find no error in a damages award based on that liability, and find no error in the Supplemental Findings based on the district court's review of the evidence.

[10] The County appeals the Final Judgment issued on April 21, 1999. While not designated as such, we interpret this Final Judgment as a final decision on summary judgment resolving all issues in favor of Simi. Simi had initially moved for partial summary judgment requesting a declaration that the County was interfering with its property. The County cross-moved for summary judgment on this issue. The district court's Interlocutory Judgment resolved the partial summary judgment motion in Simi's favor. In its Final Judgment, the district court incorporated the Interlocutory Judgment into its order and resolved all outstanding issues.

III. SUBJECT MATTER JURISDICTION

We exercise plenary review of a district court's subject matter jurisdiction. *See Rutherford v. Harris County, Tex.*, 197 F.3d 173, 189-90 (5th Cir. 1999); *Taylor-Callahan-Coleman Counties v. Dole*, 948 F.2d 953, 956 (5th Cir. 1991).

As a threshold matter, the County argues that the district court lacked federal subject matter jurisdiction to decide the case. We find that the district court had subject matter jurisdiction by reason of Simi's § 1983 substantive due process claim.

In its Opinion on Judgment, the district court provided three grounds for its jurisdiction. First, the court found that "[t]he facts pleaded state claims under the Texas Constitution to which no accommodative delay is due. . . . Whatever the eventual fate of Simi's claim for compensation, Simi is entitled to use this court's authority to correct the county's continuing non-possessory interference with its land." *See Simi*, 13 F.Supp.2d 603, 605 (S.D.Tex.1998) (citations omitted). Second, the district court found that Simi had stated claims against the County under the Fourteenth Amendment, the Civil Rights Act of 1866, and 42 U.S.C. § 1983. *See id.* As these claims are ripe without exhaustion of state remedies, the court found proper jurisdiction. Finally, the district court held that Simi is entitled to seek declaratory relief under both Texas and federal law. *See id.*

The County correctly argues that the state law claims, standing alone, do not provide federal jurisdiction. Further, we agree that Declaratory Judgment Act claims, without another basis for jurisdiction, cannot support the district court's jurisdiction. *See Lawson v. Callahan*, 111

F.3d 403, 405 (5th Cir. 1997) ("[I]t is well settled that [the Declaratory Judgment Act] does not confer subject matter jurisdiction on a federal court where none otherwise exists."). The County thus contends that the only potential federal claim available to Simi is a "takings" claim under the Fifth and Fourteenth Amendments, and that Simi has conceded that such a claim is not ripe for review.[11] While we agree that the takings claim is not ripe for review, this argument does not dispose of Simi's suit because the § 1983 substantive due process claim was properly before the district court.

In order to unpack the jurisdictional basis for the district court's holding, we revisit our recent decision in *John Corp. v. City of Houston*, 214 F.3d 573, 582 (5th Cir. 2000), in which we held that substantive due process claims alleging deprivations of property are not necessarily subsumed under the Takings Clause. As this is precisely the issue raised by the County, we find *John Corp.* to be dispositive as to the question of jurisdiction.

John Corp. recognized that "[i]ndividuals may look to several constitutional provisions for protection against state action that results in a deprivation of their property." *Id.* at 577. One of those provisions is the substantive due process component of the Fourteenth Amendment which guarantees that individuals shall not be deprived of their property without due process of law. *See* U.S. CONST. amend. XIV, § 1; *see also John Corp.*, 214 F.3d at 577

---

[11] As stated, Simi opposed removal to federal court on the grounds that a ripe federal takings question was not presented for adjudication. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 (1985).

("Substantive due process, by barring certain government actions regardless of the fairness of the procedures used to implement them, [ ] serves to prevent governmental power from being used for purposes of oppression." (alterations in original) (citations and internal quotation marks omitted)). Another provision is the Takings Clause of the Fifth Amendment. *See* U.S. CONST. amend. V; *see also John Corp.*, 214 F.3d at 577; *Samaad v. City of Dallas*, 940 F.2d 925, 933 (5th Cir. 1991) ("The Takings Clause of the Fifth Amendment directs that 'private property [shall not] be taken for public use, without just compensation.' The Supreme Court has held that the clause applies to the states through the Fourteenth Amendment." (citations omitted)). In the instant case, once Simi had its case removed to federal court, it explicitly pled a due process claim, recognizing that it did not have a takings claim.[12]

Nevertheless, the County argues that we must decide this case under the Takings Clause because "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,'

---

[12] Simi's precise claim is that the County arbitrarily interfered with its property rights, not that the County sought to acquire or regulate the use of the property. Simi argues that in the forty-year history of this strip of land, the County never tried to "take" the Simi Property in a constitutionally significant sense, but rather abused its power to frustrate Simi's rightful use of that land. Similarly, the County did not seek to condemn Simi's right of access to the property in an inverse condemnation action. The County has simply wrongfully interfered with Simi's right of access for no legitimate public purpose.

must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Again, *John Corp.* controls our analysis. We take no issue with the principle inherent in the Supreme Court's *Albright/Graham* analysis; however, in the instant case, we find a takings analysis does not exhaust Simi's constitutional claims. *John Corp.* found that under *Albright/Graham*, a more explicit provision does not necessarily preempt due process protections, and that substantive due process claims can survive a related takings argument:

> This does not mean, however, that the applicability of the more explicit provision pre-empts due process protections. *See* [*County of Sacramento v.*] *Lewis*, 523 U.S. 833, 842-44 (1998); [*United States v.*] *James Daniel Good Real Property*, 510 U.S. 43, 49 (1993) ("We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another."). Moreover, it is clear that a particular action may implicate more than one constitutional protection. *See Soldal* [*v. Cook County, Ill.*], 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn."). Thus, simply because an explicit provision applies does not mean that that provision makes inapplicable all substantive due process protections. *See Albright*, 510 U.S. at 288 (Souter, J., concurring) (suggesting

> that due process is reserved for "otherwise homeless substantial claims").

John Corp., 214 F.3d at 582.[13] Our limited holding in *John Corp.* is similarly limited here; we find only that when a state interferes with property interests, a substantive due process claim *may* survive a takings analysis and, therefore, provide jurisdiction for a federal court.

As alleged, there exists illegitimate governmental conduct that has deprived Simi of its property rights for the benefit of private interests. Because Simi submitted sufficient evidence to support its § 1983 substantive due process claim based on an allegedly arbitrary and unlawful attempt to interfere with private property rights, we reject the County's argument that the district court did not have federal subject matter jurisdiction.

IV. SUBSTANTIVE DUE PROCESS

The determination that the district court had jurisdiction to decide the federal question of substantive due process, however, does not resolve the merits of Simi's

---

[13] The recognition that the Takings Clause does not subsume all substantive due process claims does not end the ripeness inquiry. There also must be a final decision from which to appeal. As we stated in *John Corp.*, "a careful analysis must be undertaken" to determine if there has been a final decision, the lack of which would render the claim not ripe. *Id.* at 584 ("If the Court considered the claim to be a due process, rather than a takings claim, the absence of a final decision still made that claim unripe."). As the County's decision to claim ownership of the park has been final for over forty years, and was in 1994 the justification for denying Simi access to Fannin Street, we are persuaded that a final decision has been made.

claim. Our review of the County's actions must be measured against the deferential "rational basis" test that governs substantive due process. *See FM Prop. Operating Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996) ("[G]overnment action comports with substantive due process if the action is rationally related to a legitimate governmental interest."). "Whether this 'rational relation' in fact exists is a question of law that we review de novo." *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1044 (5th Cir. 1998).

"A violation of substantive due process, for example, occurs only when the government deprives someone of liberty or property; or, to use the current jargon, only when the government works a deprivation of a constitutionally protected interest." *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988) (internal quotation marks and citations omitted); *see also DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 601 (3d Cir. 1995) ("[I]n the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrary or capricious.").

Substantive due process analysis is appropriate only in cases in which government arbitrarily abuses its power to deprive individuals of constitutionally protected rights. Therefore, recognizing that reliance on substantive due process must be taken with the "utmost care," *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992), we emphasize the particularly odd factual situation in this case, and the length and degree of governmental abuse

and, thus, limit our holding to the type of blatant governmental interference with property rights that is now before us.

A. The Constitutional Right at Issue

To prevail on a substantive due process claim, Simi must first establish that it held a constitutionally protected property right to which the Fourteenth Amendment's due process protection applies. *See Spuler v. Pickar*, 958 F.2d 103, 106 (5th Cir. 1992) (citing *Baker v. McCollan*, 443 U.S. 137, 146-47 (1979)); *see also Hidden Oaks*, 138 F.3d at 1046 ("In order to assert a violation of this amendment, one must at least demonstrate the deprivation of a protected property interest established through some independent source such as state law." (internal quotation marks and citations omitted)). The nature of the property interest therefore must be determined by Texas law. *See Spuler*, 958 F.2d at 106; *see also Hidden Oaks*, 138 F.3d at 1046 ("Under this analysis, the hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except for cause." (internal quotation marks and citations omitted)).

Under Texas law, this first issue is resolved in Simi's favor. "It is the settled rule in this state that an abutting property owner possesses an easement of access which is a property right; that this easement is not limited to a right of access to the system of public roads; and that diminishment in the value of property resulting from a loss of access constitutes damage." *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996) (internal quotation marks omitted) (quoting *DuPuy v. City of Waco*, 396 S.W.2d 103, 108 (Tex.

1965)); *see also City of Beaumont v. Marks*, 443 S.W.2d 253, 255 (Tex. 1969) ("It is well settled that abutting property owners . . . have certain property rights in existing streets and highways in addition to their right in common with the general public to use them. Generally, the most important of these private rights is the access to and from the highway or street."); *State v. Meyer*, 403 S.W.2d 366, 370 (Tex. 1966); *Lethu Inc. v. City of Houston*, 23 S.W.3d 482, 485 (Tex. App. – Houston [1st Dist.] 2000, no pet.); *State v. Northborough Ctr., Inc.*, 987 S.W.2d 187, 190 (Tex. App. – Houston [14th Dist.] 1999, pet. denied). As the district court found, "Simi's western boundary is the same as the Hermann-Fannin-County-City eastern boundary; they abut by definition." Therefore, if Simi is correct in its assertion that no park exists or has ever existed, its property unquestionably abuts the Fannin Street right-of-way, and the County's interference with this access is a violation of Texas law.[14]

---

[14] The County's interference with Simi's property right of access to the abutting street also provides reason for rejecting another of the County's procedural arguments – namely that the statute of limitations bars Simi's claim. Under Texas law, "limitations is not a defense to an action to abate a continuing nuisance." *Stein v. Highland Park Indep. Sch. Dist.*, 540 S.W.2d 551, 554 (Tex. Civ. App. – Texarkana 1976, writ ref'd n.r.e.); *City of Dallas v. Early*, 281 S.W. 883 (Tex. Civ. App. – Dallas 1926, writ dism'd). We agree with the district court that Simi has alleged a continuing nuisance, asking for abatement and damages of its denial of access to an abutting street. "A continuing nuisance is a condition of such character that it may continue indefinitely." *Jamail v. Stoneledge Condo. Owners Ass'n*, 970 S.W.2d 673, 676 (Tex. App. – Austin 1998, no pet.) (citing 66 C.J.S. NUISANCE § 4 (1950)). "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Id.*

B. The Substantive Due Process Violation

Satisfied that the County's blockage of access implicates a constitutionally protected property right, we must ask next whether this denial is rationally related to a legitimate governmental interest. *See FM Prop.*, 93 F.3d at 174. "The question is only whether a rational relationship exists between the [policy] and a conceivable legitimate objective. If the question is at least debatable, there is no substantive due process violation." *Id.* (alteration in original) (citations omitted). Even under this low threshold, we are unpersuaded that a rational basis exists to justify the County's interference with Simi's property rights.

In brief, it is apparent from the record that the County cannot demonstrate that a five-foot park ever existed in between Fannin Street and the Simi Property.

(citing RESTATEMENT (SECOND) OF TORTS § 821D). In the instant case, the denial of access unreasonably interferes with the rights of property owners. It is therefore a private, continuing nuisance under Texas law, which precludes the statute of limitations defense asserted by the County.

The district court did recognize, however, that "limitations may bar the recovery of damages that accrued more than two years before suit". *Simi*, 13 F.Supp.2d at 606; *see also Stein*, 540 S.W.2d at 554 ("[A]ppellant [would not] be barred from recovery of damages for injuries suffered during the two years immediately prior to filing of her suit."). From our review of the record, it appears that the district court limited its determination of damages to damage occurring within this time period. In the October 29, 1999, hearing on damages, the district court made reference to a four-year time-frame for damages. As the original suit was filed in 1996, the 1999 determination of a four-year time period fits well within the statutory time limit for recovering damages.

Further, we can ascertain no rational reason for the County to deny abutting owners access to the street when the City of Houston now has complete jurisdiction over Fannin Street. Most troubling, however, the record reflects what the district court found to be an illegitimate plan to benefit the private interests of Hofheinz-Smith whose properties were financially benefitted by the denial of access to the other properties abutting Fannin Street. As will be discussed in detail below, the evidence demonstrates that the County acted arbitrarily in inventing a park and, thus, acted without a rational basis in depriving Simi of a constitutionally protected interest.

The dispositive question in this case is whether or not there ever was a park. The district court found that the County had never established a park. We agree.

First, the County has failed to provide any official documentation of the existence of a park. None of the five surveys included in the record shows any sign of a county park. The 1978 survey prepared by R.A. Peyton & Associates for the City of Houston shows an eight-inch water main crossing Fannin Street without reference to an intervening county park. The 1988 survey prepared for the Holly Hall Home for the Retired, located north of the Simi Property does not show a park. The 1991 survey prepared by the South Texas Surveying Associates Inc. shows Simi's property directly abutting Fannin Street. The 1993 survey prepared by PGAL Engineering for METRO in order to install a sidewalk on the strip makes no mention of a county park. Finally, in 1996, Karen Rose Engineering & Surveying completed a survey that shows the east line of the Fannin Street right-of-way and the

Simi property line to be the same. All of the above surveys were signed and sealed by registered professional surveyors.

These surveys also support Simi's claim that the Fannin Street right-of-way has always abutted the eastern properties, including the Simi Property. The district court found that the Hermann Hospital Estate deed determined the proper boundaries of the right-of-way. The deed provided that the Fannin right-of-way would run along the east side of the Astrodome property with "the remaining western portion of said Property to be used for street purposes or included in a park and stadium site lying along the West side of said Property." Under this deed, no parkland was reserved on the east of Fannin Street, and the right-of-way apparently was intended to extend to Simi's property line. No County Commissioners order changed this initial understanding of the right-of-way.[15] In fact, this understanding was confirmed when the County moved back the fences to the existing property line abutting what is now Simi's property.

In contrast, the sole descriptive evidence presented by the County was the altered version of the 1961 unsigned and unofficial plat. The altered version of the

---

[15] As the district court recognized, "A county can act only through an official 'commissioners court order' to alter a thoroughfare." *Simi*, 13 F.Supp.2d at 607 (citing TEX. TRANSP. CODE ANN. § 251.051(b)(2) (1996), which states in relevant part: "A unanimous vote of the commissioners court is required . . . to alter a public road, except to shorten it end to end."). The County has not provided any subsequent Commissioners Court order suggesting that the Fannin Street right-of-way was ever altered.

plat is of limited persuasive authority because it provides no information about the purpose or date of the alteration, and includes the language "location questionable" to denote the uncertain placement of Fannin Street. Without some justification for why a five-foot setoff was created just south of the Hofheinz-Smith land, conveniently blocking all of the other property owners, we are compelled to find that this plat cannot carry the burden of establishing the County's park.

The County also relies on *Lovett v. County of Harris*, a Texas Court of Civil Appeals case that decided an earlier dispute about this strip of land. *See* 462 S.W.2d 405 (Tex. Civ. App. – Houston [1st Dist.] 1970, writ ref'd n.r.e.). As a procedural matter, we find that the County has waived this issue for purposes of res judicata as it inexplicably failed to raise this argument until six months after the district court's Interlocutory Judgment and three years after the initial complaint.[16] However, as the case

---

[16] Nevertheless, the County contends that res judicata bars Simi's claim because this prior state court judgment supports the County's ownership of the strip of land. Again, we need not reach the merits of this claim, because the County failed to raise this issue as an affirmative defense.

"Res judicata is an affirmative defense which is considered waived if not specifically pleaded in the answer or in an amended answer permitted under FED. R. CIV. P. 15(a)." *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1199 (5th Cir. 1995); *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 172 (5th Cir. 1985) ("[R]es judicata, and hence collateral estoppel, is an affirmative defense which if not pled is considered waived."). District courts, of course, have discretion to allow late amendments "when no prejudice would result to the other party, and the ends of justice so require." *See Mozingo*, 752 F.2d

provides a discussion about the disputed land, we address its reasoning.

Lovett involved a suit by landowners whose property overlapped some of the current Simi Property. These landowners sought a mandatory injunction against the County to remove a six-foot chain-link fence, which ran along the property line and separated the Fannin Street right-of-way and their properties. *See id.* at 406. The court denied the request for an injunction finding that: (1) Fannin Street did not abut the landowners' property; (2) a 16.6 foot strip of land intervened between Fannin Street and the landowners' property; (3) neither the deed nor the City of Houston had dedicated the 16.6 feet of land as being used for street purposes; and (4) there was no taking of land under Article I, Section 17 of the Texas Constitution. *See id.* at 406-07.

This holding, while seemingly supportive of the County's claim, fails to carry the argument. First, we note that the *Lovett* court affirmed the lower court's decision which, as the *Lovett* court noted, did not include any

---

at 172. Our review is under an abuse of discretion standard. *See Morgan Guar. Trust Co. v. Blum*, 649 F.2d 342, 345-46 (5th Cir. Unit B July 1981).

In the instant case, the County did not raise the defense until three years after the original suit was filed and more than six months after the district court resolved the liability issues in its Interlocutory Judgment. We find that the district court did not abuse its discretion in denying the County's res judicata defense.

findings of fact or conclusions of law.[17] Second and more important for our purposes, no showing was made that any county park existed, or even that the County argued that a park existed on the land. All that *Lovett* proves is that, as of 1970, the County held ownership to the eastern part of Fannin Street, a conclusion with which all parties agree. Third, the *Lovett* decision supports the contention that the Fannin Street right-of-way (if not the street) extended to the boundary of the Simi Property. As this is where the disputed fence was placed, it is apparent the county land abuts the Simi Property. Finally, the state law takings holding is irrelevant to our analysis involving the existence of a substantive due process violation.

Even accepting the factual findings of the *Lovett* court, the issue left open is what happened to the 16.6 foot strip once the County yielded jurisdiction over Fannin Street to the City of Houston in 1974. It is undisputed that Fannin Street was ceded to the City, but there is no record that in doing so, the County retained an interest in a remaining five-foot strip of land. Once the City of Houston took responsibility for the street and the accompanying traffic and maintenance responsibilities, we are

---

[17] The *Lovett* court stated:

> The appellants, as movants in the trial court, had the burden of proof. No findings of fact or conclusions of law were requested or made, so we cannot say that the trial judge necessarily held with respect to all of these matters as the points of error assert that he did. His decision may well have been based, in part, on the appellants' failure to sustain their burden of proof as to some of their allegations.

Lovett, 462 S.W.2d at 407.

hard pressed to find a reason for the County's retention of five feet out of the original 16.6 feet of land.

Furthermore, the County's claim that a park has always existed is belied by the fact that the park has not been treated as such by the County. City gas lines, water lines, and a sidewalk were all constructed on the park without receiving proper authorization or an easement from the County. As the district court found in its "Chronology":

> The County and Simi Investment agree that the County cannot sell or otherwise encumber its park land unless the encumbrance is approved by Commissioners Court Order with public notice under a state statute. The County and Simi Investment agree that no Commissioners Court Order can be found authorizing Entex, Houston, or METRO to construct facilities on the property and further, that there is no evidence that the County complied with the statutory notice requirements to convey an interest in this property to Entex, the City, or METRO.

Simi, 13 F.Supp.2d at 611-12. Further, owners of other properties along Fannin Street have developed their land in a manner that demonstrates that no park exists. For example, the owners of the Holly Hall tract north of the Simi Property along Fannin Street developed their property with a twenty-five foot setback from the street, pursuant to local ordinance. This twenty-five foot setback would not have been necessary if a five-foot park intervened between the street and the property.

From the foregoing, we agree with the district court that "Harris County has no interest in an intervening

5-foot by 3,000-foot strip east of Fannin Street and west of Knight's Main Street Addition [the Simi Property] and Holly Hall property, making illegal its interference with the owners' relation to the City of Houston and Fannin Street. [and] Harris County has ceded to the city of Houston all of its right, title, and interest in the eastern-most 100 feet of land conveyed to it by the Hermann Estate." *Simi*, 13 F.Supp.2d at 612.

Measured against the rational basis test, a nonexistent park used by County officials to interfere with private property interests is clearly arbitrary, capricious, and violative of due process. "While the 'rational basis' standard is the least demanding test used by the courts to uphold [governmental] action, it is not 'toothless.' " *Berger v. City of Mayfield Heights*, 154 F.3d 621, 625 (6th Cir. 1998) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). More damaging to the County's argument, the only basis in the record to explain the County's interference with access appears to be that – as the district court recognized – this impediment would benefit the privately held Hofheinz-Smith properties and the HSA.

The record clearly suggests that creation of a park worked to enhance the value of the Hofheinz-Smith properties.[18] As the district court found, "interestingly, that

---

[18] Two letters included in the record from County officials support the understanding that the County had interfered with the private property owners to benefit Hofheinz-Smith and the HSA. A March 14, 1985 letter from Richard Doss, County Engineer for the County, to El Franco Lee, Commissioner, stated in relevant part,

ridiculously narrow park limits the access of only those property owners who would compete with the Hofheinz-Smith interests." *Simi*, 13 F.Supp.2d at 607. Proof of this influence began in 1964 when the County denied Texaco the right of access to Fannin Street on the basis of Hofheinz's objection. Furthermore, we note that the original request to gain access to the street was denied not because of the County's own claim to the land or an assertion of a park, but because of Hofheinz's erroneous assertion that HSA owned the strip of land.

That the County acted to benefit solely private interests does not necessarily demonstrate a substantive due process violation. For substantive due process purposes, "the true purpose of the [policy], (i.e., the actual purpose that may have motivated its proponents, assuming this can be known) is irrelevant for rational basis analysis." *FM Prop.*, 93 F.3d at 174. However, the County failed to

---

> [T]he lots . . . were denied access to Fannin Street to prevent the establishment of businesses that could conceivably compete with the stadium operation. Surely, before any permission were granted the Houston Sports Association should be consulted.

Similarly, an August 20, 1991 letter from Ricardo Rivero, Technical Assistant, to County Engineer Terry A. Anderson reiterated this understanding, "[T]he lots and streets in Knights Main Street Addition [the Simi Property] were denied access to Fannin Street to prevent the establishment of businesses which conceivably would compete with the operation of the Dome stadium." While we recognize that these letters are not binding on the County, they are probative, supporting the district court's Supplemental Finding that "[t]he [County's] interference had no relation to a legitimate governmental responsibility of the county whether characterized as public health, safety, or general welfare."

put forth any alternative rational basis for the continued interference with private property rights.[19] Certainly in 1994, twenty years after the County had ceded control over Fannin Street to the City of Houston, there was no rational basis for blocking access to the street. Once jurisdiction shifted to the City, whatever interests in maintaining traffic control or other governmental responsibilities that could be hypothesized to justify interference with access to Fannin Street disappear. Without a park and without a rational basis for impeding access, the County's arguments fail to survive even a rational basis review.

We, therefore, affirm the district court's findings that the County acted arbitrarily and without a legitimate governmental purpose. We hold that the invention of a

---

[19] We note that a second letter from Richard Doss to El Franco Lee on November 14, 1985, provides a mixed private/public reason for the denial of access, and comes the closest to proving a legitimate reason for the denial of access. In that letter, Doss discusses the fence that abuts the Simi Property: "The fence was erected to minimize interruption to traffic on Fannin en route to the stadium and to prevent business competition with the stadium." While the latter purpose is clearly illegitimate (benefitting purely private interests), the former could offer the requisite "rational" justification for impeding access. The flaw, however, is that this letter only addresses the *fence* abutting the Simi Property, and makes no mention of an intervening county park. As all parties have conceded that the County once owned the eastern property up to the Simi property line, this letter does little to demonstrate that a park existed and, in fact, seems to support Simi's theory that the right-of-way has always abutted its property. The question we cannot answer is what legitimate interest the County had in maintaining that fence more than a decade after it had ceded control of the Fannin Street right-of-way to the City of Houston.

park solely to deny private property holders lawful access to an abutting street is an abuse of governmental power, which on this peculiar factual foundation rises to the level of a substantive due process violation. Having successfully pled a deprivation of a constitutional right under § 1983, Simi is entitled to the relief granted by the district court.

V. ATTORNEYS' FEES

It is undisputed that attorneys' fees are provided under 42 U.S.C. § 1988 for litigants who successfully bring § 1983 claims. *See* 42 U.S.C. § 1988 ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."). "We review a district court's award of attorneys' fees for abuse of discretion, and its factual findings relating to the award of attorneys' fees for clear error." *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 348 (5th Cir. 1999). Having found that Simi has proven a successful § 1983 claim predicated on substantive due process, we agree that Simi is entitled to receive attorneys' fees.[20]

However, we find that the district court abused its discretion in awarding attorneys' fees based on legal work not provided in furtherance of Simi's § 1983 claim.

---

[20] It is apparent from the record that, in considering the award, the district court explained its reasons for the award and complied with the requirements of *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (1974). Our sole concern is the timetable used to judge the attorneys' fees.

While the record does not permit us to determine precisely what factors were controlling in the court's determination of the fee, our reading of the record leads us to be concerned that Simi's state court legal fees which preceded its amended § 1983 suit[21] were included in the calculation.

This court has held that attorneys' fees resulting from state court litigation that does not seek to enforce federal constitutional rights, but which does precede a successful § 1983 suit, are not attorneys' fees contemplated by § 1988. *See Brantley v. Surles*, 804 F.2d 321, 325 (5th Cir. 1986). This conclusion necessarily follows from the purpose of § 1988, which is to enforce § 1983 or other federal civil rights statutes. Of course, where a state proceeding is a necessary preliminary action to the enforcement of a federal claim, these attorneys' fees may be available in some circumstances, subject to the discretion of the district court. *See Redd v. Lambert*, 674 F.2d 1032, 1037 (5th Cir. 1982); *see also Barrow v. Falck*, 977 F.2d 1100, 1104 (7th Cir. 1992) ("Section 1988 permits a court to shift to defendant only those legal fees incurred in proceedings to enforce a few listed federal statutes. When proceedings in state courts or agencies are part of the enforcement of § 1983, then time reasonably devoted to them is compensable." (citing *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 71 (1980))).

Simi brought its initial suit in state court and did not allege a § 1983 violation. Without a demonstration that

---

[21] As stated, Simi's § 1983 claim was first raised in its November 18, 1996, first amended complaint.

this state suit was part of the enforcement of the § 1983 claim, legal fees relating to that litigation cannot be recovered under § 1988. Following *Brantley*, we find that the state suit was not a part of the enforcement of § 1983, and therefore, attorneys' fees relating to the state action are not recoverable. *See Brantley*, 804 F.2d at 325.

We are also concerned that the district court may have based its award on a record that includes billing reports of Simi's counsel dating back to 1990, well before the state and federal lawsuits were initiated. These records, and the district judge's assertion at the hearing on attorneys' fees that counsel had worked on the case for six years, compels us to find that the district court may have awarded an incorrect amount of attorneys' fees. Further, the district court apparently calculated the attorneys' fees with interest based on a time frame that may have included the state court proceedings. Because we find that the district court abused its discretion in considering attorneys' fees not related to the § 1983 action, we vacate the original award and remand it for reconsideration.

Having prevailed on appeal, Simi is entitled to legal fees for the appeal. On remand, we also ask the district court to decide on a reasonable fee.[22]

---

[22] We find no merit in the County's argument that the district court exceeded its authority in awarding expert witness fees. We review awards of expert fees under an abuse of discretion standard. *See Holmes v. Cessna Aircraft Co.*, 11 F.3d 63, 64 (5th Cir. 1994). The district court found in its Supplemental Findings that "the county persisted in defending its wrongful interference claim in bad faith; long after title questions had

VI. CONCLUSION

For the above stated reasons, we AFFIRM the judgment of the district court in all respects, except for the award of attorneys' fees, which we VACATE and REMAND for further consideration consistent with this opinion.

---

been clearly answered from the county's own records, it used this litigation to vex and oppress Simi." Under *Alyeska Pipeline Service Co. v. Wilderness Society*, courts may award expert fees in excess of the statutory limitations when "the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' " 421 U.S. 240, 258-59 (1975); *see also United States ex rel Wallace v. Flintco Inc.*, 143 F.3d 955, 972 n.14 (5th Cir. 1998). The district court found that the County acted vexatiously and oppressively, and from the record, we cannot conclude that such a finding was an abuse of discretion. We therefore affirm the award of expert fees.

APPENDIX 2

OPINION ON JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ENTERED AUGUST 26, 1998

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

SIMI INVESTMENT COMPANY, INC., Plaintiff, *versus* HARRIS COUNTY, TEXAS, Defendant.	§ § § § § § § §	CIVIL ACTION H-96-1603

Opinion on Judgment

1. *Introduction*

This case is another of the endless illustrations of the truth that government is an institution that prevents injustice other than that it commits itself. IBN-KHALDUN, 1 MUQADDIMAH 262 (Franz Rosenthal, trans., 1958) (1394).

A county is preventing a landowner's access to an adjacent street, claiming that a park separates the land from the right of way. The landowner seeks a declaration that its land abuts the right of way. Because the county's title precludes it from creating a park between thoroughfare and the adjacent land and because the official records show that the county never created a park, the landowner has access to the right of way.

2. *The Facts.*

In the early 1960s, Harris County decided to build an indoor stadium. Two of the promoters were R. E. Smith and Roy Hofheinz, Hofeinz had been Harris County

Judge, the chair of the county's governing board known as the county commissioners court. On two referenda, the county issued bonds and built the Astrodome on about 260 acres south of downtown Houston just inside Loop 610. The surrounding land was relatively undeveloped then. Houston Sports Association, a Hofheinz-controlled company, leased the dome from the county to use it as the home field of his baseball franchise and to sublease it to others, like the local football franchise.

The county bought twenty acres from Hermann Hospital Estate to extend Fannin Street southward past the dome and to add to the land for the dome site. The dome was west of the proposed Fannin extension. On the east side of the Fannin extension, the northern segment of the adjacent property was owned by the Hofheinz-Smith interests, the middle segment by McCarthy-Holly-Hall, and the southern segment by several unrelated people, one of whom now is Simi Investment Company, Inc. Simi's land is at the far south end of the Fannin extension, now the northeast corner of the intersection of Fannin and Loop 610.

Simi wants access for a driveway from its land directly to Fannin Street. On May 24, 1996, the county commissioners court entered an order denying Simi driveway access to Fannin. The county claims that Simi cannot cross its west boundary onto the Fannin right of way because there is a county park between Simi's land and the Fannin right of way. This supposed park – a notch out of the Fannin right of way – is 5 feet deep and 3,000 feet long; it starts immediately south of the Hofheinz-Smith land and just happens to block all other privately-owned land from access to Fannin for 3,000 feet

south to Loop 610. By contrast, the county claims that the Hofhheinz-Smith land directly abuts the right of way because the right of way is 105 feet wide there but only 100 feet wide by Simi's land with the remaining five feet being a park. The City of Houston has refused Simi access solely on the county's bare assertions that a park exists and it owns it.

Simi sued Harris County in state court for a variety of claims, including violations of rights secured by the United States Constitution, like the right not to have private property taken without just compensation. Simi seeks a declaration that its land abuts the right of way of Fannin Street. The county removed the suit because it includes federal questions. Each side has moved for judgment as a matter of law based on an agreed record.

3. *Jurisdiction*

Having removed this action from state court on the basis of federal question jurisdiction, the county now argues that this court does not have jurisdiction because Simi's takings claim is not ripe since it has not exhausted the state procedures for monetary compensation. *See* U.S. CONST. amend. V & XIV; *Trail Enterprises, Inc. v. City of Houston*, 907 F. Supp. 250 (S.D. Tex. 1995).

The facts pleaded state claims under the Texas Constitution to which no accommodative delay is due. *See* TEX CONST. art 1, § 17. An interference with property rights does not have to be an actual consumption by the government to implicate the constitutional restrictions on governmental behavior. *See e.g., Harris County v. Southern Pacific Trans. Co.*, 457 S.W.2d 336, 340 (Tex. Civ. App. –

Houston [1st Dist.] 1970, no writ). Whatever the eventual fate of Simi's claim for compensation, Simi is entitled to use this court's authority to correct the county's continuing non-possessory interference with its land. *Kansas, O. & G. Ry. Co. of Texas v. Grayson County*, 5 S.W.2d 542 (Tex. Civ. App. – Texarkana 1928, no writ).

Even if the takings claim is not ripe, Simi has claims other than for compensation. Simi's state court petition stated claims against the county under several legal theories. Simi expressly requested injunctive relief based in part on the county's violation of Simi's rights to governmental regularity under the United States Constitution. U.S. CONST., amend. XIV; Civil Rights Act of 1866, 42 U.S.C. § 1983. These federal questions are ripe without exhaustion of state remedies. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *Monroe v. Pape*, 365 U.S. 167 (1961).

Simi is entitled to seek a judicial declaration under both Texas and federal law. Declaratory Judgment Acts: TEX. CIV. PRAC & REM. CODE ANN. § 37-001 (1996); 20 U.S.C. § 2201. The county commissioners court's denying Simi driveway access to Fannin affected Simi's rights, and Simi is entitled to a declaration about that order's validity. A legal action to quiet title is in effect a declaratory judgment. Based on the competing claims, it announces a result that validates one set of propositions about the land. *See* C. FREEMAN, FREEMAN ON JUDGMENTS, § 1353 (1925); *cf. BHP Petroleum Co. v. Millard*, 800 S.W.2d 838 (Tex. 1990); *Bell v. Ott*, 606 S.W.2d 942 (Tex. Civ. App. –

Waco 1980, writ ref'd n.r.e.); *McCurdy v. Morgan*, 252 S.W.2d 264 (Tex. Civ. App. – San Antonio 1952, no writ).

This court has jurisdiction.

4. *Limitations*

The county says that Simi waited too long to bring this action. It says that it has been asserting the existence of a park for thirty-six years so the time to bring suit expired long ago. No public record or visible attributes of the land put a buyer on notice of an interest claimed by the county. Persistent repetition of a fraudulent claim does not create title. Simi claims no interest in the "park," and the county claims no interest in Simi's land.

The county is not an abutting landowner to Simi. The county's injury to Simi is an occasional assertion of an interest not adverse to Simi's actual title, but the county asserts an interest distinct from Simi's that might *affect* the rights included with Simi's ownership of the land. The county's position materially and adversely affects Simi as a result of the city's blind accession to the county's position. Because the county chooses to make the claim, the city supinely refuses to meet its responsibilities regardless of what an independent review of the facts would show.

In anticipation of interference from the county over its land rights, Simi brought this action on May 17, 1996. The county directly interfered with Simi's rights to its land on May 24, 1996, when through an official order it told the city not to allow Simi access. Because the county

has insisted that it will continue in its position, Simi has a present injury and imminent future injuries.

This spasmodic interference is neither continuous nor possessory. This case is more like a slander of title than consumption of Simi's land by a taking or spoilage. *See, e.g., Stein v. Highland Park I.S.D.*, 540 S.W.2d 551, 554 (Tex. Civ. App. – Texarkana 1976, writ ref'd n.r.e.) ("Limitations is not a defense to an action to abate a continuing nuisance."); *compare Tennessee Gas Transmission Co. v. Fromme*, 269 S.W.2d 336, 337 (Tex. 1954) ("direct invasion of one's property of a permanent character . . . the original invasion and its continuance are necessarily injurious, the damage is original, and may be at once fully compensated.").

While limitations may bar the recovery of damages that accrued more than two years before suit, it does not bar an action to stop the county's nuisance of continuing interference.

5. *The Deed.*

The Hermann Hospital Estate is a charitable trust founded by George Hermann, an early Houston lumber and oil man. In 1961, its assets included a strip of 20.67 acres along the east side of the newly created dome site. It sold that land to the county.

In the deed, Hermann limited the conveyance of the twenty acres to the county: (a) the part along the east boundary had to be used for the right of way for the Fannin extension, (b) the road had to be build within

three years, and (c) the remaining property west of Fannin could be used with the dome site as a park. The deed reads:

> the Property is being purchased with the intention of extending Fannin Street between the proposed South Loop and Old Main Street Road, with such extension to run in a North-South direction along the Eastern side of the Property described above, with the remaining Western portion of said Property to be used for street purposes or included in a park and stadium site lying along the West side of said Property.

The deed requires Fannin to be build "along the Eastern side" of Hermann's twenty acres, allowing only the property remaining on the "Western portion" to be "included in a *park and stadium site* lying along the West side. . . . " It is beyond dispute that the east side of Fannin has no stadium site and that the west side has both a park and a stadium site.

The Hermann strip was about 222 feet wide, so a 100-foot right of way left about 60% of the tract for the park *west* of the right of way. The deed does not limit the width of the right of way to 100 feet, but what few notations there are among the city and county records indicate a planned width of 100 feet. As it was built, it varies:

- In Metro's 1993 sidewalk plans, the width of the right of way is 125 feet at the south side of the Doris intersection, matching the condemnation by the Texas Department of Transportation for Loop 610.

- On the City of Houston's 1978 water main plans, the width from the east line of the Hermann tract to the west curb is 112 feet, to the water line west of the curb is 128 feet, and to the chain-link fence securing the dome site is 152 feet.

Use of the land west of Fannin also illustrates the county's lack of precision in its land management. West of Fannin, the Hermann land that was not used for the right of way is a strip about 120 feet wide and 4,000 feet long.

- The Hermann strip has never been added to the land described in the original lease from the county to Houston Sports Association, in successor documents, or in leases with later tenants.

- The fence along the Fannin side of the dome site is neither at the edge of the right of way nor the edge of the land described in the lease.

- The five-foot strip does not appear in the documents between the city of Houston and the county when Houston assumed control of the Fannin right of way.

6. *The Location*

The county has stipulated that the only documentation of an official act establishing the location of Fannin is the commissioners court's two orders of December 11, 1961, and that they establish the right of way at 100 feet along the east boundary, accepting the deed from the Hermann Estate. Exhibits 11 & 12. The other official

county actions, which include authorizing payment to the estate and relinquishing responsibility to the City of Houston for Fannin's maintenance, are ministerial.

A county can act only through an official "commissioners court order" to alter a thoroughfare. TEX. TRANSP. CODE ANN. §251.051(b)(2) (1996) ("A unanimous vote of the commissioners court is required to . . . alter a public road, except to shorten it from end to end.").

Whether the county by fiat could flout the terms of the deed from the Hermann Estate is an open question, but it need not be reached since there was no official act of the county that attempted to change the right of way as granted by the Hermann Estate.

7. *Indications*

There are several indications that there has never been a park:

A. *Surveys*

Five surveys – signed and sealed by registered professional surveyors – over the last thirty years show neither a "park" nor the peculiar variation in the right of way's width. These actual surveys all coincide with the deed and with each other; none shows a notch right of way or a park. Exhibits 20-24.

B. *Plat.*

The "park" first appears on a plat drawn as an undated amendment to an earlier plat. The amendment is

neither a public record nor a title document and has no date, author, or authority. Even it says, "Location questionable," when the "park" is shown. Exhibit 13. Other errors include (1) showing the east line of the Houston Sports Association lease as the west line of the Hermann tract – leaving a gap of over 120 feet between the leased land and the Fannin right of way – and (2) showing two directions for a straight line on the east side of the Hermann tract.

C. *Utilities.*

The local gas utility has run a two-inch service line north from Loop 610 through the "park" as if it were the Fannin right of way. Exhibit 19. The local transit authority has installed sidewalks as if the strip were the right of way. Exhibit 19, 20. The city itself has crossed the strip with water lines, apparently without noticing that it had violated the county's park. Exhibits 19 & 20. If there were a park along Fannin's east side, these acts would all be illegal.

D. *Setback.*

The city's requiring a twenty-five foot building setback also suggests that Fannin abuts the land to the east; an intervening five-foot strip would prevent the city's setback rule from applying to the Holly Hall and Simi land. *See* August 30, 1988, Survey; Section 42-61, *Houston Code of Ordinances* ("Properties adjacent to major thoroughfares . . . must have front, side and rear building setbacks of not less than twenty-five (25) feet from the adjacent major thoroughfare.").

8. *Motivation.*

The five-foot wide park mysteriously appears sometime between the deed to the county and the preparation of an undated, unofficial amended revised plat by Turner & Collie, the county's engineers. Interestingly, that ridiculously narrow park limits the access of only those property owners who would compete with the Hofheinz-Smith interests. Hofheinz and Smith are both dead, and the influence they once exercised has dissipated. The county's interest in this strip can now best be explained as a way to lower the acquisition price of property which may at some future date be needed for a potential expansion of the dome's facilities.

Favoring friends and favoring oneself by the assertion of a non-existent public interest – a fraudulent title claim – is not permissible activity for government in America. A court may conclude that the county is illegally interfering with the property of one of its citizens without determining precisely what motivated either the county's original position or its current intransigence. The United States Constitution requires that government not be arbitrary. Were the county's motive in this case free from all taint, its continuing to use governmental authority to assert a right that is manifestly nonexistent is arbitrary.

If the county had properly established a five-foot park in 1961 and had insisted on its preservation against all incursions for thirty-six years, the question of the illegality of using governmental authority for the direct benefit of cronies might be harder. The county did not

establish a park, neither has it defended it uniformly and equally.

9. *Park Bonds.*

The county says that it somehow is constrained from allowing this strip to be a right of way because the land was bought with funds from park bonds. The whole Hermann tract was bought with park-bonds funds; the order authorizing the purchase expressly allocated 100 of the tract's 220 feet of width to right of way use. The county cannot use its own ancient malfeasance as a defense to its new wrong.

10. *Evading the Deed.*

The county contends that principles of deed construction support the existence of a park. There is no need to resort to principles of deed construction; the deed is plain on its face.

The county's position on the deed would be wrong if the construction were an issue. The county says that the deed clause requiring the right of way along the *eastern* boundary is not an essential part of the transaction represented by the deed. Of course, the best evidence of the transaction thirty-six years ago is the formal documentation of the transfer; it says the road is to be on the east and the park on the west.

When a grantor attempts to exercise a right of reentry on a condition subsequent, courts examine the deed carefully to ascertain whether the language indicates an absolute grant or a conditional grant. Where "a deed contains

apt language denoting the grant of an unconditional fee estate in land, other language contained in the instrument, which merely denotes that the grant was made for a particular purpose is not regarded as implying that the grant is conditional." *Hughes v. Gladewater County Line I.S.D.*, 76 S.W.2d 471, 473 (Tex. 1934) (despite grantor's saying that "it is understood that the land is deeded to the Trustees for School purposes only," other language made deed absolute, defeating reversion when school was abandoned).

The deed is the only evidence of the nature of the transaction itself. Its significance remains compelling even if the Hermann Estate could not have recovered the land from the county. Simi does not seek to enforce a right reserved to the Hermann Estate or itself under the deed; rather, it seeks to enforce its right under state and federal law derived from the county's locating Fannin Street (a) where it is and (b) where it bound itself to locate it by accepting the fee granted.

11. *Right to Access.*

Simi's western boundary is the same as the Hermann-Fannin-County-City eastern boundary; they abut by definition. A property that abuts thoroughfare, like Fannin, is entitled to access to that thoroughfare under Texas law; the right to access to a thoroughfare is a property right that cannot be taken without compensation. *State v. Meyer*, 403 S.W.2d 366, 371 (Tex. 1966) ("That this right of access is a property right which is encompassed by Article I, Section 17 of the Constitution of Texas . . . is so well-settled as to require no citation of

authority."); *DuPuy v. City of Waco*, 396 S.W.2d 103, 108 (Tex. 1965) ("It is the settled rule in this state that an abutting property owner possesses an easement of access which is a property right; that this easement is not limited to a right of access to the system of public roads; and that diminishment in the value of property resulting from a loss of access constitutes damage."); *City of Waco v. Texland Corp.*, 446 S.W.2d 1, 2 (Tex. 1969) ("[A]n abutting property owner possesses an easement of access which is a property right."). Fannin Street in Houston is not abandoned. *Cf. State v. Fuller*, 407 S.W.2d 215 (Tex. 1966).

12. *Road versus Right of Way.*

The county argues desperately that the actual concrete of Fannin's pavement does not touch Simi's land. The right of way for a street could have no street on it, but it would still be a right of way. A multilane roadway named Fannin Street, complete with curbs and gutters, extends south from Old Main to Loop 610 along the eastern side of the Hermann tract as the deed, commissioners court order, and city ordinance provided it should. The distance between the concrete and the east boundary of the right of way is consistent for the whole length; there is no five-foot offset in the pavement where the "park" starts.

13. *Degree of Impairment.*

The county says that it cannot be liable unless its impairment is "material and substantial." Assuming that standard applies to this case, the county has completely and absolutely denied Simi's access to Fannin; that is

material and substantial. Simi is not complaining that some governmental act of the county affects its access. Simi complains that it has a property interest under state law that the county is required to honor.

When the county passed Fannin Street to the City of Houston, the county lost all interest in the right of way. The county abandoned its title to the city, yet it persists in interfering with its former neighbor's property.

14. *Conclusion*

Harris County is illegally asserting this peculiar interest causing present harm to Simi. The right of way for Fannin Street abuts Simi's tract; Simi has a right of access to Fannin Street across the Hermann-Simi boundary. The judgment defining the vacuity of the county's claim should preclude future assertions of this claim, making an injunction unnecessary at this time. As a precaution, jurisdiction is reserved, as is the issue of attorney's fees.

Signed August 26, 1998 at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

Addendum to Opinion
Simi Investments, Inc. v. Harris County, Texas

Chronology

1. Smith and Hofheinz acquire property north of Simi's property.

August 9, 1946	John C. Garrott and Warren B. Garrott convey to McCarthy Center, Inc., 58.20 acres several blocks north of the Simi property, along the eastern boundary of the Hermann Hospital tract that became the right of way line of Fannin Street.
September 6, 1949	McCarthy Center, Inc., conveys to Glenn H. McCarthy 20 acres out of the south part of the 58.20 acres.
September 7, 1949	Glenn H. McCarthy conveys to Holly Hall, Inc., a charitable organization, this 20 acres.
August 24, 1961	Hilton Center, Inc., (successor to the McCarthy Center) conveys to Hilton Hotels Corporation 38.18 acres remaining out of the north part of the original 58.20 acres.
August 24, 1961	Hilton Hotels Corporation conveys to R. E. Smith and Roy Hofheinz this 38.18 acres.

2. The county fixes the location of Fannin.

August 8, 1961	City of Houston approves general location of proposed streets

in vicinity of the dome, including Fannin, limited that "before Harris County actually commences the acquisition of right of way for a particular street, the details of the alignment and project for that street shall be submitted to and approved by the City's Director[s] of Public works . . . , Traffic . . . and . . . City Planning."

August 21, 1961 — Harris County Attorney's Office sends the Commissioners Court the August 8, 1961, city ordinance "authorizing acquisition by County of right of way" and "two maps, with street alignments with correction as to Fannin Street. . . . " (The two maps could not be found.).

August 28, 1961 — Four days after Hofheinz/Smith buy the 38.18-acre tract from Hilton, the Commissioners Court approved the general location and alignment of Fannin Street on a 20.68-acre tract about 220 feet wide and 4,000 feet long, running north to south, owned by the Hermann Hospital Estate, and authorized the right of way department to acquire it for right of way purposes. (The maps in the order could not be found.).

The 20.68 acres abut the Hofheinz/Smith 38.18 acres as

well as the property several blocks south now owned by Simi.

October 16, 1961 — Turner & Collie, engineers for the county, draws a plat that depicts Hermann's 20.68 acres to be acquired by the County; it does not depict the location of Fannin. This is not a survey.

December 5, 1961 — Herman Hospital Estate conveys to Harris County the 20.68-acre tract for extending Fannin Street between Old Main Street and the proposed South Loop "along the Eastern side" of the 20.68-acre tract, "with the remaining Western portion of said Property to be used for street purposes or included in a park and stadium site lying along the West side of said Property."

December 11, 1961 — Commissioners Court authorizes the acceptance of the Hermann deed and payment for the 20.68 acres based on the language in the deed requiring Fannin along the "eastern side" of the 20.68 acres.

The order also says that "Harris County is to move back the existing fences to the new right of way line. . . . " Harris County's existing fence is on Simi's property line.

After an exhaustive search by the County and Simi, no later order

of Commissioners Court was found that modified in any way the alignment of the Fannin Street right of way described in the Hermann deed and commissioners' order of December 11, 1961.

December 11, 1961 The same day, the Commissioners Court ratified and confirmed the 20.68 acre purchase and conveyance as a right of way purchase and conveyance.

3. Engineer's Interlude.

Unknown: Alterations are made to a copy of the October 16 Turner & Collie plat; however, no revision date indicates when the alterations were made, neither is there an indication of the purpose of the later version of the plat. The "new" plat has hatch marks defining the "eastern side of the Houston Sports Association Lease" as well as the spontaneous appearance of the "park" off set.

The altered plat depicts the alignment of Fannin Street on the eastern side of the 20.68-acre tract as it runs north-to-south *until* it comes to the southern boundary of the Hofheinz/Smith 38.18-acre tract, where the right of way line takes a 90 degree turn west for

5.00 feet and then another 90 degree turn south, leaving the apparent Fannin Street right of way 5.00 feet off of all properties south of the Hofheinz/Smith tract; however, along this 5.00 foot strip appears the notation "location questionable."

Reinforcing the "working paper" questionable character of this plat is that it has two different directions for the north-south line that forms the eastern boundary of what is depicted as the Fannin Street right of way from Holly Hall south to the South Loop although the north-south line does not change directions (52° 26'33" E and 52° 29'56" E).

4. County denies access to Fannin at Hofheinz's dictation.

December 2, 1964	C. J. Ashley with Texaco, Inc., writes W. Kyle Chapman, County Commissioner for Precinct One, requesting access to Fannin from property at the northeast corner of Fannin Street and the South Loop. Ashley sent a copy to Richard P. Doss, County Engineer.
January 4, 1965	Doss writes Hofheinz at Smith/Hofheinz Interests asking whether Hofheinz will allow Texaco access to Fannin Street.

January 7, 1965 — Hofheinz as president writes Doss that the Houston Sports Association is "unalterably opposed to the granting of such access" to Fannin.

Hofheinz incorrectly asserts in his letter that the strip of land on the east side of Fannin Street is covered by the Houston Sports Association's lease with Harris County; the H.S.A. lease extends in an easterly direction into the Hermann Hospital Estate property only approximately 38 feet. The County and Simi agree that the H.S.A. lease has never extended east of the Fannin Street right of way.

January 12, 1965 — Doss writes to Chapman telling him of Hofheinz's opposition to access Fannin. In this letter, Doss offers to notify Texaco that its request for access has been denied. A hand-written note on the letter says: "Mr. Doss to notify Texaco access denied."

5. Post-acquisition events about the Fannin right of way

March 7, 1974 — Harris County removes Fannin Street from its Road Logs, yielding jurisdiction over Fannin to the City of Houston.

November 6, 1974 — Entex constructs a gas line in the east side of the Fannin Street right of way from Naomi south

	to the 610 South Loop. The Entex pipeline runs north-to-south inside the "park" offset. No Commissioners Court Order or other document can be found to show the County authorized an easement in the "park" to Entex.
June 14, 1978	The City of Houston approves plans for an 8-inch water line that crosses the "park" offset. The plans show no strip between the Fannin Street right-of-way and the properties to the east of Fannin Street. No Commissioners Court Order or other document can be found to show the County authorized an easement for the City in the "park."
April 29, 1993	The Metropolitan Transit Authority of Harris County (of which the County is a constituent government that appoints two board members) approves the construction of a sidewalk on the east of Fannin from Greenbriar to the 610 South Loop on the "park" property. The sidewalk plans show the Fannin right of way abutting all of the properties on the east of Fannin, including the Simi property. These plans do not show an intervening strip between the Fannin Street right of way and the properties to the east.

No Commissioners Court Order or other document can be found to show the County authorized an easement for METRO.

The County and Simi Investment agree that the County cannot sell or otherwise encumber its park land unless the encumbrance is approved by Commissioners Court Order with public notice under a state statute.

The County and Simi Investment agree that no Commissioners Court Order can be found authorizing Entex, Houston, or METRO to construct facilities on the property, and further, that there is no evidence that the County complied with the statutory notice requirements to convey an interest in this property to Entex, the City, or METRO.

6. The only *surveys* of the Fannin right of way show no strip.

August 30, 1988 — Signed and sealed survey for Holly Hall tract, immediately south of Hofheinz/Smith tract, depicts the property line as the edge of the Fannin right of way and indicates the 25-foot building setback line from that property line. This conforms to the Houston ordinance on building lines.

Section 42-61, *Houston Code of Ordinances* says that: "Properties

	adjacent to major thoroughfares . . . must have front, side, and rear building setbacks of not less than twenty-five (25) feet from the *adjacent major thoroughfare.*" If a five-foot wide "park" intervened between Fannin right of way and the Holly Hall property, no 25-foot setback would have been required.
January 8, 1991	Signed and sealed survey of portions of Fannin right of way shown abutting Simi's by Fred W. Lawton of South Texas Surveying Associates, Inc.
April 28, 1993	Signed and sealed survey by PGAL Engineering showing the Fannin right of way from Naomi south to the Loop 610 South abutting all properties on its east.
August 15, 1996	Signed and sealed Survey by Karen Rose Engineering & Surveying of Fannin right of way and the Entex pipeline, METRO sidewalk, and other landmarks in the Fannin right of way as they are situated near vicinity of the Simi property. The survey shows the east line of the Fannin Street right of way and the west line of the Simi property as the same, with no strip of land between the Fannin right of way line and the Simi property.

APPENDIX 3

FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ENTERED APRIL 21, 1999

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

SIMI INVESTMENT COMPANY, INC., Plaintiff,	§	
versus	§	CIVIL ACTION H-96-1603
HARRIS COUNTY, TEXAS, Defendant.	§	

Final Judgment

1. Harris County never established a park and has no other interest lying between:

   A. The eastern boundary of the Hermann Estate tract conveyed to Harris County by the deed recorded at volume 4579, page 403, of the Harris County deed records; and

   B. The western boundary of Lots One and Four of Block 68 of Knight's Main Street Addition as recorded at volume 572, page 117, in the deed records of Harris County, Texas, which lots are now owned by Simi Investment Company, Inc.

2. Harris County has no interest in an intervening 5-foot by 3,000-foot strip east of Fannin Street and west of Knight's Main Street Addition and Holly Hall property, making illegal its interference with the owner's relation to the City of Houston and Fannin Street.

3. Harris County has ceded to the City of Houston all of its right, title, and interest in the eastern-most 100 feet of land conveyed to it by the Hermann Estate.

4. The City of Houston's Fannin Street right-of-way abuts directly and fully the west boundary of Lots

One and Four of Block 68 of Knight's Main Street Addition as recorded at volume 572, page 117, in the deed records of Harris County, Texas.

5. Simi Investment Company, Inc., may have direct access to the Fannin Street right-of-way from its Lots One and Four of Block 68 of Knight's Main Street Addition.

6. Simi Investment Company, Inc., takes $823,540.00 in damages from Harris County. The damages bear interest from March 31, 1999, at the post-judgment rate of 4.732 percent.

7. Simi recovers from Harris County $367,000 in attorneys' fees and $116,994.32 in expenses. The attorneys' fees and expenses bear interest from April 19, 1999, at the post-judgment rate of 4.732 percent.

Signed April 20, 1999, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX 4

SUPPLEMENTAL FINDINGS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ENTERED MAY 13, 1999

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

SIMI INVESTMENT COMPANY, INC., Plaintiff,	§	
versus	§	CIVIL ACTION H-96-1603
HARRIS COUNTY, TEXAS, Defendant.	§	

Supplemental Findings

The court finds that:

1. Harris County interfered with Simi Investment's property rights arbitrarily, and knowing the absence of factual or legal support for its interference, Harris County persisted in interfering with Simi's property.

2. The interference had no relation to a legitimate governmental responsibility of the county whether characterized as public health, safety, or general welfare.

3. The interference was an abuse of governmental power. Rather than accidentally drawing a line that might have confused Simi's access, the county used drawings that it knew were corrupt. The county took Simi's access without authority and without a plausible – much less a good faith – basis for acting, making its action irrational and malicious.

4. The county persisted in defending its wrongful interference claim in bad faith; long after the title questions had been clearly answered from the county's own records, it used this litigation to vex and oppress Simi.

5. Acting under its authority at law, Harris County deliberately violated Simi's rights under the United States Constitution. *See* 42 U.S.C. § 1983.

Signed May 13, 1999, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX 5

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON PETITION FOR REHEARING EN BANC FILED JUNE 28, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20686

SIMI INVESTMENT COMPANY INC

Plaintiff-Appellee

v.

HARRIS COUNTY TEXAS

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

(Filed Jun. 28, 2001)

Before KING, Chief Judge, and REYNALDO G. GARZA and PARKER, Circuit Judges.

OPINION ON PETITION FOR REHEARING EN BANC
(Opinion December 21, 2000 (5th Cir. 2000) 236 F.3d 240)

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

We take this opportunity to address the concern expressed by Harris County as to the scope of the substantive due process holding in this case. In *John Corp. v. City of Houston*, this court stated that "a careful analysis must be undertaken to assess the extent to which a plaintiff's substantive due process claim rests on protections that are also afforded by the Takings Clause." 214 F.3d 573, 583 (5th Cir. 2000). In the majority of cases involving landowner complaints, substantive due process is not the appropriate avenue of relief. Our Takings Clause jurisprudence cannot be circumvented by artful pleading of substantive due process claims. Except in the rare cases of deprivations of property based on, for example, illegitimate and arbitrary governmental abuse,[1] vague statutes,[2] or retroactive statutes,[3] the takings analysis established

---

[1] *See Simi Inv. Co. v. Harris County, Tex.*, 236 F.3d 240, 249 (5th Cir. 2000); *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 600-01 (3d Cir. 1995).

[2] *See John Corp. v. City of Houston*, 214 F.3d 573, 585 (5th Cir. 2000).

[3] In *Eastern Enterprises v. Apfel*, the Supreme Court held unconstitutional a provision of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9706. *See* 524 U.S. 498, 538 (1998). The Court split 4-1-4, with five Justices concluding that a substantive due process analysis, and not a Takings Clause analysis, should be used to determine the constitutionality of the statute, which had retroactive effect. *See id.* at 547 (Kennedy, J., concurring in the judgment and dissenting in part) (determining that "the case is controlled not by the Takings Clause but by well-settled due process principles respecting retroactive laws."); *see id.* at 554 (Breyer, J., dissenting) (agreeing with Justice Kennedy and stating "at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for

by the Supreme Court and this circuit should control constitutional violations involving property rights that have been infringed by governmental action.[4]

---

legitimate government action that takes 'private property' to serve the 'public' good.").

[4] *See, e.g., Palazzolo v. Rhode Island*, ___ S. Ct. ___, 2001 WL 721005 (June 28, 2001); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-94 (1985); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 128 (1978); *Samaad v. City of Dallas*, 940 F.2d 925, 936-37 (5th Cir. 1991); *see also, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999); *Dolan v. City of Tigard*, 512 U.S. 374, 386-88 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987).

APPENDIX 6
CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT V – U.S. CONSTITUTION

. . . nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV – U.S. CONSTITUTION

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

28 U.S.C. § 1821

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, . . . shall be paid the fees and allowances provided by this section.

. . .

(b) A witness shall be paid an attendance fee of $40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

. . .

28 U.S.C. § 1920

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

. . .